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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1146

CIA DE NAV. MAR. NETUMAR,

Petitioner,

—against—

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

BRIEF OF INTERNATIONAL TERMINAL OPERATING CO., INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

This is a petition for a writ of certiorari in connection with a judgment of the U. S. Court of Appeals for the Second Circuit entered on December 11, 1974 affirming a judgment in favor of the plaintiff in the sum of $42,000 and a dismissal of the third-party complaint against International Terminal Operating Co., Inc. This case was tried before the Honorable Robert J. Ward and a jury which answered special questions with respect to the issues set forth by the complaint and the third-party complaint. In answering these questions the jury found that the defendant was negligent and its vessel, the SS MOSQUEIRO,

was not unseaworthy and that plaintiff was free of any contributory negligence.

As to the third-party complaint although the jury found that International Terminal Operating Co., Inc. had breached its warranty of workmanlike performance of the stevedoring operation, the jury found that the defendant shipowner was precluded by its conduct from recovering indemnity from International Terminal Operating Co., Inc. Shipowner's motion for judgment notwithstanding the verdict or for a new trial was denied by Judge Ward. The shipowner then filed a notice of appeal and plaintiff filed a notice of protective cross appeal. The appeal was argued on November 14, 1974 and decided and filed on December 11, 1974 at which time the Court of Appeals affirmed the judgment. Shipowner then petitioned for a rehearing with a suggestion for a hearing en banc. This petition was denied on February 3, 1975. The petition for a writ of certiorari was served on March 11, 1975.

Issue

Whether the petitioner has presented any issue of paramount importance for resolution by this Court or any conflict of Circuits dealing with indemnity between shipowner and stevedore which commends itself to this Court granting a writ of certiorari.

Facts

On November 5, 1970 plaintiff was a longshoreman employed by International Terminal Operating Co., Inc., at Pier 36, East River, New York, and was working aboard the SS MOSQUEIRO, a vessel owned by the defendant, Cia de Nav. Mar. Netumar. Plaintiff testified that while

he was engaged with his fellow longshoremen in loading pipes into a pipe bed which had been constructed by the defendant, New Jersey Export Marine Carpenters, Inc., on the weather deck of the SS MOSQUEIRO he sustained an injury to his left foot when it became caught between some of the pipes.

The plaintiff's testimony in this case indicated that one or more of the uprights supporting the pipe bed, made by the defendant, New Jersey Export Marine Carpenters, Inc., broke or collapsed causing the pipe to roll onto plaintiff's left foot resulting in the injuries for which this action was brought (30a, 31a, 68a). Plaintiff himself testified that the uprights broke notwithstanding the fact that the pipes were landed nice and easy by the longshoremen and the winch man had put them in place perfectly (45a, 49a, 70a, 71a). Plaintiff testified that although he was present throughout the entire loading operation he did not see any draft of pipes strike any of the uprights in the pipe bed (48a, 51a, 60a, 71a, 74a).

James Ratliff, I.T.O.'s hatch boss, testified that the longshoremen loaded the pipes in the locations where they were told to load them by the ship's officers and although he was present throughout the loading operation he did not see any of the drafts of pipes strike the uprights (80a, 106a). Nevertheless it was his testimony that one of the uprights in the pipe bed broke (93a, 104a, 105a). It was also his testimony that he inspected the pipe bed and saw nothing wrong with it and that after the plaintiff's accident happened pipes were loaded on top of the No. 1 hatch (85a, 86a, 99a).

James Head, another witness called by the plaintiff, testified that after the accident the longshoremen began loading pipes across the hatch covers up to a level with

the pipes in the pipe beds on either side of the No. 1 hatch (133a, 134a, 137a, 138a). He also testified that the pipes were lowered into the pipe bed very gently and did not strike the uprights at any time (132a). William Brooks, another witness called by the plaintiff, testified that the uprights in the pipe bed collapsed while the plaintiff was reaching for the hook to unhook the last draft and that the pipes only moved when the pipe beds collapsed (140a, 141a). Brooks also testified that when the longshoremen returned to work in the afternoon they began to load pipes across the top of the No. 1 hatch (161a).

The plaintiff, Ratliff, Brooks and Head, agreed that throughout the course of the loading operation the pipes were lowered and landed gently into the pipe bed and that at no time did any of the pipe come into contact with any of the uprights of the pipe bed. Furthermore, they all testified that at no time did they observe any damage to any part of the pipe bed (36a, 71a, 80a, 106a). Ratliff, Head and Brooks were also in complete agreement that one or more uprights broke at the time of plaintiff's accident (77a, 78a, 104a, 105a, 121a, 140a, 141a).

The testimony on behalf of the plaintiff thus presented a factual situation wherein the plaintiff and his witnesses all testified that, despite the fact that no draft of pipes struck the uprights in the pipe bed at any time prior to plaintiff's accident, the uprights in the pipe bed broke or collapsed at the time of plaintiff's accident causing one or more pipes to roll upon his left foot. Although the plaintiff and his witnesses testified that, at the time of the accident, the pipes were loaded below the top of the uprights in the pipe bed, William Montella, General Manager of the defendant, New Jersey Export Marine Carpenters, Inc., testified that when he saw the pipe bed after the

plaintiff's accident the pipes were loaded higher than the uprights (258a).

Montella also testified that Richard Piper, the Port Captain for the defendant shipowner, told him exactly what to do in connection with the construction of the pipe beds right down to what nails to use and what lumber to use (236a). Montella further testified that Piper ordered two pipe beds and not 3 (169a, 202a, 253a). Piper admitted that as Port Captain he was responsible for the loading and unloading of the vessel in conjunction with the ship's officers (173a). Piper also testified that there were some 41 pieces of pipe to be loaded in the pipe beds on either side of the No. 1 hatch and it appeared from the cargo plan that there were 41 pieces of pipe to be loaded in the vicinity of the No. 1 hatch (180a).

Although Richard Piper did not appear personally at the trial, his pre-trial deposition was read into evidence and it was his testimony that he had the responsibility for the loading and unloading of the vessel (175a) and also to coordinate stowage, the ordering of labor and equipment and the overall supervision of the loading operation (172a).

Piper testified that he verbally ordered 3 pipe beds from the defendant, New Jersey Export Marine Carpenters, Inc., (184a) and although he admitted that he did not specifically tell Montella the amount of pipe to be loaded into these pipe beds, he claimed that he gave him the full booking of the vessel and left it up to him to determine the size and location of each pipe bed (184a, 185a, 186a).

Captain James White, the expert who testified for New Jersey Export Marine Carpenters, Inc., stated that the carpenters made the pipe bed for the shipowner and that

in the normal and customary practice the shipowner would accept or reject the pipe beds, based upon its own inspection thereof (267a). Captain White also testified that it was customary for ship's officers to shake the uprights to see if they were wobbly in the course of its inspection (268a, 269a).

Captain William Wheeler, I.T.O.'s expert, testified that the chief mate and the carpenter foreman had the duty to inspect the pipe bed (337a). Captain Wheeler further testified that since the pipe bed was made for the shipowner the chief mate had the duty of inspecting it and, if he was satisfied, he would then turn it over to the stevedore for the pipe loading operation (370a, 371a, 376a, 384a, 385a). Captain Wheeler also testified that the hatch boss was only required to make a visual inspection of the pipe bed and that the shipowner had an officer in overall supervision of loading (336a, 337a, 338a, 370a, 384a, 385a).

The various motions, made at various junctures of the case, were denied by the Court (190a-200a, 323a-332a, 393a, 394a). The Court, in denying the defendant's post-trial motion, held that there was sufficient probative evidence to support the jury's verdict and that there was evidence of conduct on the part of the shipowner sufficient to preclude recovery of indemnity (459a, 460a).

Reasons for Denying Petitioner Certiorari as to Respondent, International Terminal Operating Co., Inc.

The Trial Court in an unassailable charge in a maritime personal injury case and the United States Court of Appeals in its decision affirming in all respects the judgment below have correctly applied the maritime law as to all facets of this case.

The proof in this case established conduct on the part of the shipowner precluding indemnity and the jury so found. The jury verdict in favor of respondent, International Terminal Operating Co., Inc., on that subject is unassailable on appeal since it is supported by the evidence and was solely within the jury's province to decide. *Weyerhaeuser Steamship Company* v. *Nacirema Operating Company,* 355 U.S. 563, 78 S. Ct. 438; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 82 S. Ct. 780; *International Term. Op. Co.* v. *N.V. Nederl. A.S.M.,* 393 U.S. 74, 89 S. Ct. 53.

In the *Weyerhaeuser* case, *supra,* this Court held that whether a contractor had breached its warranty of workmanlike performance and whether a shipowner's conduct is sufficient to preclude recovery of indemnity are issues for jury consideration under appropriate instruction. This proposition is so fundamental that it is no longer open to argument. Since this Court held that the indemnity issues are for jury consideration, it follows that these issues were properly submitted to the jury for their consideration in this case and so the Court below found.

In the *Ellerman* case, *supra,* this Court said that neither the Supreme Court nor the Court of Appeals could redetermine facts found by the jury any more than the District Court can predetermine them since it would result in a collision with the Seventh Amendment. Claims for maritime indemnity must be left to the jury's determination and once the jury has made a determination with respect thereto no appellate Court may set aside the verdict because it feels that other results are more reasonable. *International Terminal Operating Co., Inc.* v. *N.V. Nederl.,* 393 U.S. 74, 89 S. Ct. 53, *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29.

The function of a reviewing Court then is solely to determine if there is any evidence to support the verdict. In this case there is ample testimony to support conduct on the part of the shipowner sufficient to preclude recovery of indemnity from the stevedore and so the Court below held. Conduct sufficient to preclude indemnity can be an act of omission or commission and the shipowner can be precluded by action or inaction on its part.

The *Weyerhaeuser* proposition, as enunciated by this Court, indicating that a shipowner is entitled to indemnity absent conduct on its part sufficient to preclude recovery is not restricted to active conduct on the part of the shipowner which would prevent, hinder or handicap a stevedore in performing a workmanlike job. *Humble Oil and Refining Company* v. *Philadelphia Ship Maintenance Co.*, 444 F. 2d 727. Certainly a direction by a shipowner to a stevedore to load more pipes into a pipe bed than it would hold would actively hinder the stevedore in the performance of its work and prevent it from doing a workmanlike job.

Manifestly, the shipowner was negligent in failing to order enough pipe beds, in attempting to load too much pipe into beds which it had ordered and in negligently supervising or failing to supervise the loading operation so as to prevent the pipe beds, which it had ordered, from being overloaded. This conduct on the part of the shipowner not only constitutes negligence but constituted conduct on its part which handicapped the stevedore in the performance of its work and precluded the shipowner from recovering indemnity.

In *Italia Societa Azioni* v. *Oregon Stevedoring Company*, 376 U.S. 315, 84 S. Ct. 748, this Court held that liability for a longshoreman's injury should fall upon the party best situated to adopt preventive measures and thereby

reduce the likelihood of injury. This philosophy of permitting the ultimate loss to fall upon the party which was best able to prevent that loss has been followed in the Second Circuit. *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (1974); *Bertino* v. *Polish Ocean Line*, 402 F. 2d 863 (1968). The party to this case most able to minimize the particular risk involved was obviously the shipowner and the Court below was correct in upholding the jury verdict and the Trial Court in denying indemnity to the shipowner.

The decision of the Court below is not in conflict with the decision of other Courts of Appeals on the question of conduct precluding indemnity. The Third Circuit in the *Humble Oil* case, *supra*, held that *inaction* by the shipowner could constitute conduct precluding indemnity and the Court of Appeals in the Ninth Circuit in *H & H Ship Service Company* v. *Weyerhaeuser Line*, 382 F. 2d 711, cited by petitioner, did *not* hold that inaction can *never* be sufficient to preclude indemnity.

That part of the petition dealing with the alleged inconsistency in the jury's verdict with respect to the plaintiff's recovery is left for Respondent, Conceicaio, to deal with. It plays no part in the resolution of the question of indemnity.

With the Trial Court having properly submitted to the jury, under a proper charge, the question of shipowner's conduct precluding indemnity, with the jury having decided that question in favor of International Terminal Operating Co., Inc., and with the Court of Appeals having determined that sufficient evidence supports that result,* nothing is presented by petitioner vis-a-vis Inter-

* (Appendix A18, following the petition):
"We think it clear that the party to this case most able to minimize the particular risk involved was the shipowner *since*,

national Terminal Operating Co., Inc. which commends itself to this Court. Indeed, in complaining of what the United States Court of Appeals wrote with regard to the plaintiff's recovery and the "fact findings" which it allegedly made, petitioner avers that it was denied

> "the right guaranteed by the Seventh Amendment to have all issues determined by a jury." (P. 8 of petition)

Surely, it cannot be heard to complain with regard to International Terminal Operating Co., Inc. where its dispute with International Terminal Operating Co., Inc. had been submitted to a jury, as dictated by the decisions of this Court and subordinate Courts.

With respect to indemnity, petitioner does not present a question of paramount importance for this Court to settle. Not only has the criteria fo indemnity been enunciated by this Court heretofore, time and again, but with regard to accidents after November 26, 1972, the Congress has outlawed all kinds of indemnity actions against the stevedore-employer, 33 U.S.C.A. §905(b); *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106 (1974).

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on sufficient evidence, the jury found that there was 'action or inaction on the part of the shipowner which prevented, hindered or seriously handicapped the stevedore in performing a workmanlike job'".

CONCLUSION

It is familiar learning that not every petition, submitted by a petitioner, who is disgruntled over the result of litigation, commends itself to this Court's consideration. Certainly nothing has been presented in the instant matter with which this Court should tarry in reaching a decision denying the petition for a writ.

Respectfully submitted,

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